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No. 90-6013

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERM, 1992

ROBERT WAYNE LEE,
Petitioner,

VS.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.;
DR. SCOTT CALHOON;
OKLAHOMA HEALTHCARE CORPORATION;
AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Respondents.

ON APPEAL FROM THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Tenth Circuit Court of Appeals erred in reinterpreting the Restatement (Second) of Torts, thus extending tort law beyond that as now followed in all fifty states and other Circuits, as well as this Court, and creating precedent not only for Oklahoma, but for all states in the Tenth Circuit, and persuasive law in all other circuits, thus violating the constitutionally protected rights of AIDS victims in a physician/patient privilege?

II. Whether Petitioner's fundamentally protected rights of due process and right to travel have been unconstitutionally infringed by the Tenth Circuit, which ignored its own past precedent in holding that even if Petitioner had not waived the physician/patient privilege, the statements made by Respondent doctor were conditionally privileged under tort law?

III. Whether the Tenth Circuit Court of Appeals erred in upholding the District Court's granting of Summary Judgment to Respondent doctor on Petitioner's Section 652 B claim after Petitioner clearly established an issue of fact regarding lack of consent for the administration of an AIDS test given to the Petitioner?

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OPINIONS BELOW

The United States Tenth Circuit Court of Appeals rendered its opinion (No. 90-6013) on November 6, 1991, and denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1992. Said appeal was from an Order and Judgment for the Respondents entered by the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma on December 12, 1989.

JURISDICTION

The jurisdiction of this Court is invoked under RULE 10 (a) of the RULES OF THE SUPREME COURT OF THE UNITED STATES, for the reason that the decision of the United States Court of Appeals for the Tenth Circuit, in its opinion below (Case No. 90-6013), stands in direct and irreconcilable conflict with prior cases in its own circuit, those of other Circuit Courts and past decisions of this Honorable Court.

Jurisdiction of the Tenth Circuit Court of Appeals was based upon 28, U.S.C. Sec. 1291, providing for appeals for final decisions of the District Courts.

Jurisdiction of the District Court was predicated upon 28 U.S.C. Sec. 1331 and 1332, in that this is an action alleging a violation of Petitioner's constitutional, state statutory, and common law rights of privacy.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Constitution:

First Amendment of the U.S. Constitution

Fourteenth Amendment of the U.S. Constitution

Statutory:

12 O.S. Sec. 1443.1

76 O.S. Sec. 19B

STATEMENT OF THE CASE

The instant case was decided upon a Motion for Summary Judgment. Accordingly, the Peti-

tioner has set forth below a statement of the case, with reference to the initial record including attached Exhibits and portions of depositions. On May 3, 1987, the Petitioner, Robert Wayne Lee, went to the emergency room of Baptist Hospital in Oklahoma City, Oklahoma. Respondent, Scott Calhoon, M.D., and Scott Calhoon, M.D., Inc. (hereinafter referred to as Respondent Calhoon) was the surgeon on call for Baptist Hospital. Respondent Calhoon diagnosed the Petitioner's condition as appendicitis and obtained a consent form from the Petitioner for an appendectomy only. (Docket Entry #21, Exhibit "A", Docket Entry #33, Exhibit "F"). Contrary to the initial diagnosis and the consent given by the Petitioner, Petitioner awoke from surgery to find that a colostomy had been performed.

Further, blood had been drawn and an HIV test performed (AIDS test) without the Petitioner's knowledge and/or consent. (Docket Entry #126, Exhibit "B"). Although this Exhibit shows the physician to be the Respondent Calhoon requesting the test, there is conflicting testimony and a lack of records requested by the Petitioner to establish the exact date the blood was drawn and who ordered the test. (Docket Entry #152, Exhibit "C" & "D") and (Docket Entry #133, Exhibit "A"). The Petitioner never gave his consent for an AIDS test. Petitioner prior to his admittance into Baptist Hospital had no knowledge of any exposure to the HIV virus. (Docket Entry #126, Exhibit "B").

The Petitioner initially filed a medical-malpractice claim for misdiagnosis against all of

the Respondents captioned in this case on March 1, 1988, in U.S. District Court for the Western District of Oklahoma. The complaint as filed made no reference to AIDS or exposure to the HIV virus due to the fact that Petitioner was not alleging any connection between the alleged medical-malpractice and the condition of being exposed to the HIV virus. In fact, Petitioner would not have been able to evaluate and determine any possible connection prior to filing his complaint on March 1, 1988, since he was denied access to his medical records by the Respondent hospital. Other than the self serving defamatory statements of Respondent made to the press the day he was served, there has never been a judicial determination or evidence from any other doctor that there is any connection whatsoever between the medical-malpractice case and AIDS.

Petitioner's attorney presented to U.S. District Judge Thompson a Motion for Immediate Production of those medical records prior to filing his initial complaint. Upon being advised that Judge Thompson would not enter an Order for Immediate Production of Documents, Petitioner filed the complaint, and a Motion to Produce on March 1, 1988, (Docket 1 & 3). Judge Thompson's Order denying the Motion was filed on March 1, 1988. (Docket 4).

After the filing of the Petitioner's complaint, the Respondent, Scott Calhoon, M.D., voluntarily gave a statement to the *Daily Oklahoman* stating that the Petitioner was a carrier of the AIDS virus. Not only once did he tell the world the Petitioner had "AIDS," but he said it three times

to insure that no one missed the point. This article was published on March 2, 1988. Subsequent to this unauthorized publication of the Petitioner's condition, Petitioner filed a Motion to Amend his complaint on August 30, 1988. (Docket 20) and filed his Amended Complaint on September 28, 1988 (Docket 31). The basis of his amended complaint was invasion of privacy, breach of physician/patient confidentiality and lack of informed consent.

Petitioner was never advised prior to filing the initial suit that his condition of being exposed to the HIV virus was in any way connected to the colostomy. Further, the medical records when finally produced *after the complaint was filed* did not indicate a connection between the colostomy surgery and his condition of being exposed to the HIV virus. The *answers filed by the Respondents* (Docket Entry #6 & #9) *do not allege a connection between the necessity of a colostomy and his condition of being exposed to the AIDS virus.* Further, it was not until the deposition of the Petitioner on October 21, 1988, that Petitioner or his counsel had any idea that there was a connection between the alleged malpractice and the condition of being exposed to the HIV virus at page 252-255.

Respondent Calhoon has never produced an authorization for an AIDS test. The Petitioner requested the deposition of Dr. Orville Rickey and Stanley Hupfield, both associated with the hospital, in order to obtain documents to determine when the test was ordered and who ordered it. The Court by Docket Entry #143 finally allowed the Petitioner to take those depositions

but held that the document production request by the Petitioner exceeded the permissible bounds of discovery and directed the Petitioner to confer with the Respondent Calhoon concerning document production. (Docket Entry #141, Production of Documents, Exhibits of subpoenas duces tecum).

The documents produced by these witnesses did not establish beyond all doubt the name of any doctor responsible for ordering this test or when the test was ordered or produce any documents which would allow Petitioner to apply for further discovery. Three forms, which have been included in the appendix herein, clearly suggest that Dr. Calhoon was the one who ordered the test. The Petitioner was provided less than requested and only what Respondent wanted to provide.

The Petitioner, having been limited in its discovery, was unable to provide further evidence to the Court. The Respondent Calhoon and the former Respondent, Baptist Hospital, have exclusive control of those records. By virtue of this fact and since the Respondent did not produce documentation to exonerate him, it must be concluded that the document establishing the doctor responsible for ordering the test without the Petitioner's consent has been withheld from the Petitioner and cannot be presented to this Court in support of Petitioner's contention for lack of consent. However, Petitioner, by sworn Affidavit, denied giving consent (Docket Entry #133, Exhibit "A") which *raised a question of fact.* Thus, the inference and fact question is that no consent form exists.

On December 1, 1988, (Docket 86) an Order was entered dismissing the medical-malpractice claim against all Respondents and dismissing the amended complaint for invasion of privacy, breach of physician/patient confidentiality and lack of consent as to all Respondents with the exception of Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. Thus, the only remaining Respondents before this Court are Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. and the only claim against these two remaining Respondents is the amended complaint of defamation, invasion of privacy, breach of physician/patient confidentiality and lack of informed consent. *The remaining Respondents and the Petitioner filed Motions for Summary Judgment and Motions for Partial Summary Judgments.* The Court's final Order as to these Motions was entered on December 12, 1989, entering a Summary Judgment in favor of the Respondents, Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. On January 11, 1990, the Petitioner filed a Notice of Appeal.

On November 6, 1991, the Tenth Circuit Court of Appeals handed down its opinion, for publication, affirming the District Court in all respects. (A copy of this Order has been made part of the Appendix herein).

Subsequently, the Petitioner filed a Motion for Rehearing and Suggestion for Rehearing En Banc which was denied by the Tenth Circuit on January 16, 1992. (A copy of said Denial has been made part of the Appendix herein).

ARGUMENT

I. **THE TENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DIS-**

TRICT COURT'S FINDING THAT, BY FILING A MALPRACTICE ACTION AGAINST THE RESPONDENT DOCTOR, THE PETITIONER WAIVED THE PHYSICIAN/PATIENT PRIVILEGE, SUCH THAT THE RESPONDENT WAS ALLOWED TO PROCLAIM TO THE PUBLIC THAT THE PETITIONER "HAD AIDS."

As has been previously stated, the medical-malpractice action was dismissed and the only remaining issue was that in the amended complaint for invasion of privacy, physician/patient confidentiality, and lack of consent. In regard to the physician/patient confidentiality, the District Court ruled on June 27, 1989 (Docket Entry #131) at page 9:

> "*While the Court would concur that disclosure of the confidential medical information that was not relevant* to the medical-malpractice suit *might be actionable,* the disclosures made by the Respondent apparently pertained to his defense of the lawsuit." (Emphasis added.)

the Court in its Order continues at page 10:

> "Therefore, *although the Court does not intend by its decision to vindicate the Respondent's statements or condone his behavior,* he concludes that the Petitioner, by filing his lawsuit, waived the physician-Petitioner privilege to the extent of any communications material to the litigation (either the Petitioner's claims or defenses), thus precluding him from recovering for breach of an implied agreement of confidentiality." (Emphasis added.)

The Tenth Circuit upheld this finding, and Petitioner appeals said conclusion as erroneous

inasmuch as the District Court admitted that there was no evidence presented that the information was relevant to the medical-malpractice action, but only "apparently pertained" to the action and further, Petitioner would direct the Court to District Judge Thompson's statement at page 3 of the opinion filed on June 27, 1989 (Docket Entry #131), wherein the Court stated:

> "It *cannot be disputed that Respondent Calhoon publicly disclosed a personal matter,* and the Court previously concluded in its March 16, 1989, Order that the *statements would be offensive to a reasonable person.* Therefore, the issues to be determined are whether the Respondent's divulgence was of legitimate concern to the public or was privileged." (Emphasis added.)

The Restatement (second) of Torts Sec. 652 D provided in pertinent part that:

> One who gives publicity to a matter concerning the public life of another is subject to liability of the other for invasion of his privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

By the District Court's own admission, the Petitioner had met the standard of 652 D (a) and by the Court's own admission, there was not evidence presented to meet 652 D (b) as a defense in that the Court by its own language said it would only "apparently" pertain to a defense.

On appeal, the Tenth Circuit acknowledged that Oklahoma Courts recognize a right of action for invasion of privacy, if a Petitioner can estab-

lish the public disclosure of a private fact, when such fact is not of "legitimate public concern." *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okla. 1980).

The Tenth Circuit held, however, that the Petitioner had become a public figure by filing the initial medical malpractice claim due to the nature and size of the claim ($38 million). Throughout the Respondent's pleadings at the District Court level and the Tenth Circuit, the $38 million figure is redundantly mentioned to present an image of sympathy for the Respondents and divert the attention of the Court from the real issues. Once and for all, Petitioner respectfully requests that this red herring be put aside and the real issues be appropriately addressed.

The initial prayer for relief totalling $38 million included punitive damages. Punitive damages are designed to gain the attention of a tort feasor and impress upon that tort feasor the errors of his way such that no other person will become a helpless victim at his hands. In light of the fact that Defendant's cumulative gross assets are well in excess of $700 million, a prayer for $38 million including punitive damages is not unreasonable and was not made to sensationalize the Petitioner's case.

Petitioner respectfully submits that the opinion of the Tenth Circuit herein is extending the meaning of Restatement (Second) of Torts, Sec. 652(D)(b), and creates new and unnecessary law. As such, said extension irreconcilably conflicts with all other circuit courts and this Court as to the definition and scope of tort law. If this Court

upholds the Tenth Circuit ruling, all other courts will fall in line with it like soldiers and the meaning of the U.S. Constitution shall have been irrevocably changed by a circuit court by deleting an individual's inalienable right to privacy, dignity and the pursuit of happiness.

Petitioner respectfully points out that this conclusion misses one important point, namely that the "publisher" here is not a member of the press, or anything like it. He is simply a litigant to a lawsuit. A review of the cases cited by the Tenth Circuit as determinative on these matters, as set out in *Gilbert v. Medical Economics*, 665 F. 2d 305, (10th Dir. 1981) indicates that every one of them was involved with the protection of the First Amendment *freedom of the press.*

In *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed. 328 (1975), the emphasis is on the nature of the press and the service it provides a free society. The conflict in that case is seen as between privacy rights and the rights of the press, specifically:

> ". . . In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."

Cox, supra, p. 491

In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967), this Court was even more expansive as to the import of the protection of the freedom of the press, but couched its comments specifically in terms of press freedom:

> "In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."

Time, Inc., supra, p. 389

In the case at bar there are simply no such considerations. It is true that the Respondent uttered his phrases to a member of the press, but *there is no legitimate nexus between that fact and the protection of the freedoms of the press as opposed to the rights of privacy in the individual. A finding that Respondent would have to pay for his invasion of Petitioner's privacy will chill no freedoms enjoyed by the press.* There will be no attack on our political system or our open society.

To hold as has been done thus far in this case, however, expands those rights correctly claimed by the press to all those whom they cover. The litigants in every suit will be deemed to say almost anything they want in a case, so long as it is to the press, and reasonably near filing day of some sort of pleading. This results in the particular rule of law set out in 652 as being meaningless, or re-written. Virtually every case found by this writer has involved the *press* with regard to this rule of law. *None relate to the interviewee,* or his rights and privileges during the interview. This Court had never extended this doctrine to

this limit. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465, 42 L.Ed. 419 (1974).

The comments to the Restatement itself draw the battle line as between the rights of the press and those of privacy:

> "It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control."

Restatement, Torts Second, Sec. 652 D Comment on Clause (b), Section D

The litany of what is considered news under Section G in the same comment does not include anything resembling the scenario in the case at bar, and in Section H of the same comment it is stated:

> ". . . The line is to be drawn when the publicity ceases to be the giving of information *to which the public is entitled and becomes a morbid and sensational prying into private lives* for its own sake, with which a reasonable member of the public, with decent standards, would say they had no concern. The *limitations,* in other words, *are those of common decency, having due regard to the freedom of the press* and its reasonable leeway to choose what it will tell the public, but also *due regard done to him by the exposure . . .*"

Restatement Torts Second, Sec. 652 D Comment on Clause (b), Section H (Emphasis added.)

The harm that has resulted to the Petitioner as a direct result of the statements made herein is indeed great. The Petitioner has been forced to quit his job, move to a new city and change his name in order to avoid persecution and further embarrassment suffered by himself as well as his family.

The above issue is clearly a question of fact, a question not susceptible to the granting of Summary Judgment, as questions of common decency are among those most apt to provoke a disagreement even among reasonable persons on a jury. To affirm the granting of such judgment on such grounds as to issues when they relate to freedom of the press is dangerous. To do so where the issues do not run to freedom of the press extends unnecessarily the scope and reach of Sec. 652, to no good effect and to a point this Court has never endorsed.

As the Supreme Court of Oklahoma recognized in *Northrip v. Montgomery Ward & Co.*, 49 P. 2d 489 (Okla. 1974):

> "No less an authority than the Supreme Court of the United States has held in the *United States v. Diebold*, 369 U.S. 654, on Summary Judgment the inference drawn on the underlying facts contained in such material must be viewed in the light most favorable to the party opposing the motion."

The Respondent claims, and both lower Courts have held, that by the filing of his initial lawsuit, there was an absolute waiver of privilege to the physician/patient confidentiality

rule. In *Guinn v. Church of Christ of Collinsville*, 775 P. 2d 766 (Okl. 1989). Headnote 6 ESTOPPEL states " 'Waiver' is voluntary or intentional relinquishment of known right."

Referring back to the record, *the complaint* that was filed by the Petitioner on March 1, 1988, *made absolutely no mention of AIDS.* Further, the complaint filed herein alleged that unnecessary surgery and misdiagnosis since the Petitioner had been advised he was being operated on for appendicitis and not a colostomy. Further, the records would show that on March 1, 1988, a Motion to Produce was filed by the Petitioner requesting the medical records due to the fact that the Respondent hospital had refused to provide medical records to the Petitioner or to Petitioner's counsel. Said Motion to Produce was denied by District Judge Thompson on March 1, 1988.

At this point, Petitioner had no idea that there was any connection whatsoever between the unconsented to colostomy and the subsequent discovery of his exposure to the HIV virus. Further, to this date, there is no evidence of any connection. Clearly, had Petitioner known that there was any connection at that time or that there could possibly be any connection, the lawsuit would have been filed under John Doe and appropriate motions and applications for protective orders would have been filed. In the case of *Inhofe v. Wiseman,* 772 P. 2d 389 (Okl. 1989) at 393 the Court stated:

> "Pretrial depositions are not public parts of a civil trial. They were not open to the public at common law and, in general, they are con-

> ducted in private as a matter of modern practice. Much of the information surfacing during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Traditionally, discovered information, not yet admitted, is not a public source of information. Unless otherwise ordered by the Court, depositions are sealed until admitted into evidence.

There is absolutely no evidence in the record that the Petitioner had *knowledge and appreciation* of danger and *"volenti non fit injuria"* by filing a complaint based on medical malpractice in order to give the Respondent the right to tell the world the Petitioner had AIDS.

Being denied access to medical records, he was not able to even determine a remote possibility of a connection between his HIV exposure to an unconsented surgery. It is beyond reasonable expectation that he voluntarily waived any right to privacy by filing the complaint. The disclosure by the Respondent, Dr. Scott Calhoon, to the public in the form of a newspaper release that the Petitioner was an AIDS carrier was a clear violation of the physician/patient confidentiality. The obvious basis for this unauthorized disclosure was malicious and based upon self-interest. *If such were not the case, Respondent's counsel would have raised the issue in his answer in the malpractice action.* The Petitioner would point out that the deposition of the Petitioner, Robert W. Lee, taken on October 21, 1988, at page 252-255 was the first indication that the Petitioner even had that there was any connection between his exposure to the HIV virus and

any alleged medical malpractice case was revealed in an allegation by counsel for Baptist Hospital, Mr. Glenn Huff.

In addition, Petitioner points out that Dr. Calhoon did not report the Petitioner's condition as an AIDS carrier to the Oklahoma State Department of Health as required by law.

A persons' right to privacy concerning his physical condition cannot be cavalierly dismissed. The Court in *Doe v. Coughlin,* 697 F. Supp. 1234, (N.D.N.Y. 1988) stated concerning persons with AIDS which is an inevitably fatal condition in upholding the right of privacy as follows:

> "In the Court's view *there are few matters of a more personal nature and there are few decisions over which a person could have a greater desire to exercise control,* than the manner in which he reveals that diagnosis to others. An *individual's decision to tell family members* as well as the *general community that he is suffering from an incurable disease, particularly one such as AIDS, is clearly an emotional and sensitive one fraught with serious implications for that individual."* (Emphasis added.)

Moreover, in the case of *Woods v. White,* 689 Fed. Supp. 874 at page 876 (W.D. Wis. 1988), a Court recognized that:

> "Given the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, *it is difficult to argue that information about this disease is not information of the most personal kind,* or that an individual would not have an interest in protecting against the dissemination of such

information. See Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274, 1287-1288 (1986) (noting possible serious consequences of mandatory AIDS testing, including possibility that public reporting requirements may discourage some individuals from seeking tests.)

It is for the reasons stated herein that the Petitioner respectfully submits that the Summary Judgment granted for the Respondent doctor by the District Court, and affirmed by the Tenth Circuit, must be reversed and remanded and that the facts herein be presented to a trier of fact.

II. **THE TENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S FINDING THAT EVEN IF THE PETITIONER HAD NOT WAIVED THE PHYSICIAN/PATIENT PRIVILEGE, THE STATEMENTS MADE BY THE RESPONDENT DOCTOR WERE CONDITIONALLY PRIVILEGED AND COULD NOT BE A BASIS FOR INVADING THE PETITIONER'S RIGHT TO PRIVACY UNDER SECTION 652 B OF THE RESTATEMENT (SECOND) OF TORTS.**

Title 76 O.S. Sec. 19B provides as follows:

"In cases involving a claim for personal injury or death against a practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, or where any person has placed in issue the physical or mental condition of any other persona or deceased person

> by or through whom such person rightfully claims, he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such patient; *provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence.* (Emphasis added.)

It is clear in the language that the purpose of this statute was to allow doctors and hospitals involved in lawsuits to obtain complete medical records of a Petitioner in order to evaluate the physical condition of that Petitioner in relation to the alleged claims. It is obvious from the language underlined above that this intent of the legislature was that information obtained in order to evaluate the physical condition of the Petitioner in relation to a particular claim not be open to public view unless it was, "material and relevant to an issue therein." Respondent Calhoon attempts to interpret the statute to allow him to expose whatever information he may have in his files to the entire public. It is obvious that the intent of this statute was to aid in discovery, but yet to protect any Petitioner from unnecessary disclosure.

The irony in this present case is that the Respondent Calhoon is attempting to hide behind a discovery statute of the State of Oklahoma when, in fact, he had those records in his own

possession. They were his own records and he disclosed them to the public *one* day after the Petitioner filed a lawsuit on the basis of medical-malpractice unrelated to his condition of being exposed to the HIV virus.

The District Court and Tenth Circuit held that Dr. Calhoon's statements to the press were conditionally privileged under Restatement (second) of Torts Sec. 594, which provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in Sec. 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists ... when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment ... Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another ... (Comment K, Sec. 594)

Title 12 O.S. 1443.1 was interpreted by the Tenth Circuit as supporting the above finding. In part, the statute provides that expressions of opinion in regard to judicial proceedings are not actionable as libel, since they are "privileged communications."

In making this ruling, the Tenth Circuit ignored its own precedent established in *Klier Advertising v. Premier Pontiac*, 921 F. 2d 1036 (10th Cir. 1990). It should be noted that the *Klier* case was not decided until after briefs were filed by both Petitioner and Dr. Calhoon. For this reason, neither party was able to address or brief this case for the Court's consideration.

In *Klier*, the Tenth Circuit held that statements by a party litigant about his lawsuit were not privileged under 12 O.S. Sec. 1443.1. The party in that case had said some allegedly libelous remarks in commenting on a lawsuit filed against him. They were quoted by the *Tulsa World*, and when his legal opponent sought relief, this Court said:

> "Regarding privilege, even a cursory reading of section 1443.1 shows that its legislative purpose is to protect First Amendment rights attached to all *official* reporting of any legislative or judicial proceedings . . .
>
> There *can be no serious argument that Bill Stokely's comments to the press amounted to 'official reporting' even if, as the trial court pointed out, the statements merely reflected Stokely, Inc.'s affirmative defenses set out in pleadings that were public record."*

Klier, supra, at p. 1043 (Emphasis added.)

In the case at bar the Court, in its opinion on page 10, asserts just the opposite, that ". . . expressions of opinion in regard to judicial proceedings are not actionable as libel . . ." and then sets out verbatim Sec. 1443.1.

Appellant asserts that the prior holding of the Court in *Klier* is the appropriate one, since it is apparent from the words used in the statute that the communication the legislature had in mind was that of the press in commenting on a trial or other proceeding, and not the offhand remarks, often inflammatory and meant to be so, from the litigants. This appears to be a further codification of the First Amendment rights, as set out by the *Klier* Court, and may be instructive as well in the inquiry as to the rest of the issues presented herein.

This is also consistent with recent Oklahoma case law as discussed by the *Klier* court. In *Kirschstein v. Hayes,* 788 P. 2d 941, (Okla. 1990) the Oklahoma Supreme Court stated that the inquiry as to this aspect of Sec. 1443.1 turns to a large extent on the determination of to whom the publication is made. In *Kirschstein,* the publication via the media to the public, unrelated to the actual judicial process, was enough to render the statements unprivileged.

As in *Klier,* it is difficult to see how the statements made by Dr. Calhoon can, in the Court's eyes, amount to "official reporting." The facts, as previously mentioned, clearly demonstrate that those *statements were not even provided in the Respondent's answer,* filed subsequent to the date of the statements.

So it is with the case at bar. The filing of a suit in and of itself does not render statements made the next day sufficiently connected to warrant the privilege under Sec. 1443.1, because the declarant in *Klier* made his statements the next day in response to a reporter asking his impressions of the suit. *With the same facts in the case herein, the result must be the same, the difference spelled out, or precedent suffer.*

Public policy also suggests a conclusion different and necessary from that reached by the Tenth Circuit. All across the country, the peers of the Respondent physician are consistently fighting the required disclosure by some of them that they themselves have tested positive for Human Immuno-deficiency Virus. They do so on grounds of privacy. *Leckelt v. Board of Commissioners of Hospital District No. 1* 714 F. Supp. 1377, affirmed 909 F. 2d 820 (5th Cir 1990), *Glover v. Eastern Nebraska Community Office of Retardation,* 867 F. 2d 461 (1989), *Estate of Behringer v. Medical Center at Princeton,* 2409 N.J. Super. 597, 592 A. 2d 1251 (1991). Yet, in the case at bar, the physician has seen fit to publicize the same information about Petitioner, arguing that it is "legitimate concern to the public."

This contradiction, as adopted in essence under the current opinion of the Tenth Circuit, will cement in place a double standard. Physicians need not disclose to patients or potential patients their risk of contracting AIDS, but should a patient sue for malpractice, his blood results are fair game for the public and the media. This is likewise the logical result of the line of reasoning in the current opinion concern-

ing the waiver of physician patient privilege upon filing suit. It is patently clear from the privilege statute cited by the Court that the privilege waiver intended in 76 O.S. Sec. 19 has to do with the introduction of the information in question as evidence in the trial. The evil obviously sought to be addressed by the legislature was the claiming of privilege during suit, so as to hamper a physician's defense when under malpractice attack. To stretch such intent over to allowing the physician to use it offensively, to discourage suits before they begin, is not reasonably to be considered to have been within the legislature intent.

The creation of this set of circumstances is not one which will serve justice well. If physicians' privacy is invaded by divulging their HIV blood test results, so is that of Petitioner herein. This jurisdiction should not take the lead in promoting such a double standard.

Finally, as aforementioned, Petitioner has suffered severe harm. He has been forced to relocate, give up his job and assume a new name. His constitutionally protected right to life and right to travel have been infringed, as he must now live as a second-class citizen.

For these reasons, as well as those stated by Petitioner in his previous argument, Petitioner respectfully requests that the Summary Judgment granted and upheld in this case be reversed and remanded and presented to a trier of fact.

III. **THE TENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S GRANTING OF A SUMMARY JUDG-**

MENT TO THE RESPONDENT DOCTOR AFTER PETITIONER CLEARLY ESTABLISHED AN ISSUE OF FACT REGARDING LACK OF CONSENT FOR THE ADMINISTRATION OF AN AIDS TEST GIVEN TO PETITIONER.

As previously mentioned, the Petitioner, Robert Wayne Lee, never consented to being tested for AIDS and was denied access to his medical records.

Despite this fact, the Tenth Circuit upheld the District Court's conclusion that there was sufficient "evidence" submitted by Dr. Calhoon to the effect that the doctor did not order or authorize an AIDS test of the Petitioner.

The only "evidence" submitted by Dr. Calhoon was a self-serving affidavit of Dr. Calhoon himself stating the above. Yet the only HIV tests that were supplied to Petitioner clearly suggest that not only was Dr. Calhoon the Petitioner's treating physician, but that he was the one responsible for ordering the tests. (See Appendix).

At a minimum, this creates a genuine issue of material fact that should be presented to a jury.

It should be noted, however, that the Petitioner was denied access to most, if not all, medical records from his initial date of treatment.

Moreover, the Petitioner certainly did not consent to the release of the information derived from the tests.

Furthermore, the doctrine of "informed consent," as adopted in Oklahoma, appears to have been breached, based upon the facts of this case.

"The doctrine imposes a duty on a physician to inform a patient of his options and their attendant risks. If a physician breaches this duty, patient's consent is defective, and physician is responsible for the consequences."

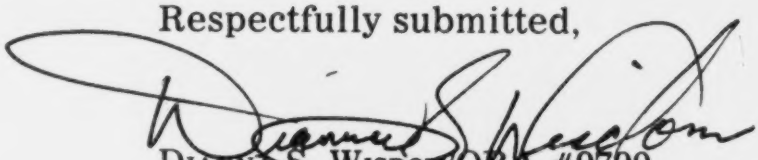
Dr. Calhoon, the Petitioner's treating physician, never did personally inform Robert Lee that he had tested positive for AIDS. In a medical-malpractice action which raises the question of informed consent where the Petitioner testifies there was no consent given, the issue must be resolved by examining the credibility of the Plaintiff's testimony. The credibility of the witness is not within the province of the trial court but must be submitted to the jury. *Smith v. Karen S. Reisig, M.D., supra,* at 286. It is clear from the record that there is a question of fact concerning informed consent. In the case of *Rea v. Wichita Morg. Corp.*, 747 F. 2d 567 (10th Cir. 1984) at 568 the Court held that the burden is on the moving party to show the absence of a genuine issue of a material fact, and the pleadings and other documentary evidence must be construed in favor of the opposing party.

CONCLUSION

This is not justice and without justice we are nothing. Petitioner Robert Wayne Lee respectfully requests this Court to reverse and remand this cause to the District Court for the Western District of Oklahoma so that the issues presented herein may be properly submitted to a jury which is the only appropriate forum where a genuine question of fact must be decided. One lonely, frightened man came to the halls of justice, filed a complaint and was unmercifully

crucified without any explanation of "why." This is not the way it is supposed to happen, and if it is justice does not exist except for the rich and influential.

Respectfully submitted,



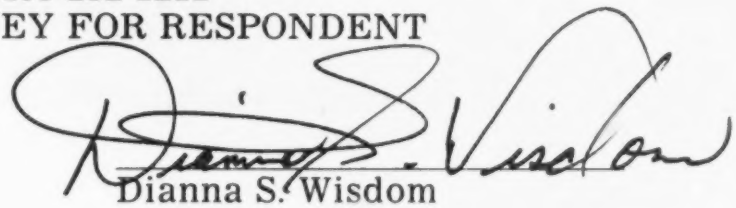
DIANNA S. WISDOM, OBA #9790
3120 Northwest 23rd Street
Oklahoma City, Oklahoma 73107
(405) 528-1888

Attorney for Petitioner

CERTIFICATE OF SERVICE

This certifies that on the 14th day of April, 1992, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, via U.S. Mail, to the following:

Mr. George W. Paull/OBA# 6977
Short, Barnes, Wiggins, Margo & Adler
1400 American First Tower
Oklahoma City, OK 73102
Phone # 405-232-1211
ATTORNEY FOR RESPONDENT



Dianna S. Wisdom

APPENDIX A

Lawsuit Claims Unneeded Surgery

By Wayne Singleterry
Staff Writer

Robert Wayne Lee says he went to the Baptist Medical Center's emergency room suffering from a pain in the side and was diagnosed as needing an appendectomy.

But when he came out of surgery, he says he discovered that Dr. Scott Calhoon had performed an intestinal bypass, known as a colostomy, according to a malpractice suit filed in federal court here.

The Orange County, Fla., man has sued Calhoon and Baptist Medical Center, seeking $38 million. Lee says he went to Baptist while visiting Oklahoma City last May.

Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.

"He was seen in the emergency room and thought to have appendicitis," Calhoon said.

"This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.

"Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.

"If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered," Calhoon said.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

-vs-

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.;
DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION;
AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

Deposition of Robert Wayne Lee
Taken on October 21, 1988
On Behalf of the Defendants
at Oklahoma City, Oklahoma

APPEARANCES:

MS. DIANNA S. WISDOM and MR. PAT LaMOURE, Attorneys at Law, 4401 N. Classen, Suite 200, Oklahoma City, Oklahoma 73118, appearing on behalf of the Robert Wayne Lee.

MR. GEORGE W. PAULL, of the firm of Short, Barnes, Wiggins, Margo & Adler, Attorneys at Law, 1400 American First Tower, Oklahoma City, Oklahoma 73102, appearing on behalf of Dr. Calhoon.

MR. GLENN HUFF and MS. SUSAN SHORT, of the firm of Foliart, Huff, Ottaway & Caldwell, 20th Floor, First National Center, Oklahoma City, Oklahoma 73102, appearing on behalf of Baptist Medical Center.

REPORTED BY:
Ms. Pamela J. Booker,
Oklahoma Notary and
Shorthand Reporter

CERTIFICATE

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

I, Pamela J. Booker, Oklahoma Notary and Shorthand Reporter for the State of Oklahoma, certify that Robert Wayne Lee was by me sworn to testify the truth; that the deposition was taken by me in stenotype and thereafter transcribed and is a true and correct transcript of the testimony of the witness; that the deposition was taken on October 21, 1988, in Oklahoma City, Oklahoma; that I am not an attorney for or a relative of either party, or otherwise interested in this action.

Witness my hand and seal of office on this 24th day of October, 1988.

_____

Pamela J. Booker,
Oklahoma Notary and
Shorthand Reporter

Q. Can I highlight it for you here?

A. You sure may.

Q. Okay. I'm going to highlight, "monogamous times six months."

A. Six months, yes.

Q. Had you been monogamous for six months?

A. I hadn't done anything for six months. That's what I was questioning. That, monogamous to me is like you were living with someone for six months, I would take it to mean that.

(Short interruption)

MR. HUFF: Counsel, I know in discovery disputes, there's a requirement of the 14B conference, can we say that this suffices for the 14B conference that we have a bona fide dispute as to discovery or the discoverability of your client's homosexual activities and the identity of –

MS. WISDOM: Yes.

MR. HUFF: – people that have been involved in that?

MS. WISDOM: In that same regard, the question concerning release of information from his personnel file, which I presume you probably would want to present at the same time, I would say that we have had our 14B conference, and also in that regard, I would advise that since, as Mr. Lee has stated, none of his friends, relative, or employers, or co-workers, he has ever directly told that he has AIDS, and I realize that during the deposition, there were a lot of names of friends, relatives, co-workers, et cetera. We would also like the opportunity to present, possibly at the same time, an application for a protective order to Judge Thompson concerning that, in that it is our feeling that he has not waived any physician, patient privilege, or any rights thereunder by filing

the lawsuit, and that if you were to contact these people prior to us getting a ruling from the judge as to the protective order, we feel that that would be a direct damage to him if, in fact, he does have that privilege, and that that information that he may or may not have tested HIV positive was ever made known to anyone other than a doctor that he directly told, or anyone that he may have directly told.

So if we may have that understanding, we would like to present an application for a protective order to the judge at the same time, and we can get both of those taken care of, and however he rules, possibly take it up at our next deposition.

MR. HUFF: It's our position that the medical condition that Dr. Calhoon treated is the direct result of Mr. Lee's being an AIDS carrier and having the AIDS virus and that is the reason, one of the reasons for the condition that has been treated by Dr. Calhoon. I think they're inextricably intertwined, and cannot be separated.

I certainly recognize your right to fight for a protective order, but it would be our position in that regard that our defense in this case is going to necessitate exploring in some detail the medical condition that his being an AIDS carrier that resulted in this condition that necessitated the surgery.

And as well, since it is a defamation action, and as you're well aware, the suit in which it is being alleged that his reputation has been damaged, I think opens his reputation to scrutiny from all angles, and we have every right to get into that.

And, now, I do not want to unnecessarily advertise the fact that he is an AIDS carrier, but on the other hand I cannot agree to be unduly restricted in contacting witnesses and talking to witnesses about Mr. Lee, about his reputation, about any potential

damage to his reputation, and in fact, we feel if there is any damage to his reputation that it is due to the filing of the lawsuit more than anything else.

I don't know that we're doing anything more than just arguing back and forth. I cannot agree to be bound by any restraint upon who we might contact.

MS. WISDOM: Okay. I understand that. I'm simply asking, or simply stating our position in asking that we be allowed to present that issue to Judge Thompson, and in that regard —

MR. HUFF: That's fine with me.

MS. WISDOM: This is the first time I've ever heard that it was alleged that the AIDS was connected to his condition, in which case I understand what you're saying in terms of relevancy.

MR. HUFF: Now that we've made all these records — in view of all this, it's my understanding that at this time we are recessing the deposition of the Plaintiff, and it is to be reset at a later date, either by agreement, if no agreement, to be reached by notice, but to allow parties and their counsel in the meantime to pursue the appropriate motions, discovery motions of the court.

(Short interruption)

MR. PAULL: Mr. Lee, under the rules of the court, you have the right to read and review this transcript that will be printed in transcript form. To reserve that right, you need to inform this lady to your right, or you may waive that right in which case I'm sure your counsel will provide you with a copy.

Counsel, due to this late date, I would

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

[Filed December 12, 1989]

JUDGMENT

In accordance with the orders entered these dates, December 12, 1989, July 24, 1989 and June 27, 1989, judgment is entered in favor of the defendant Dr. Scott Calhoon and against the plaintiff Robert Wayne Lee.

IT IS SO ORDERED this 12th day of December, 1989.

UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 12-12-89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

[Filed December 12, 1989]

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. The plaintiff subsequently amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Both parties filed motions for summary judgment and summary judgment was granted in favor of defendant Calhoon on the defamation claim, the plaintiff's invasion of privacy claim under § 652D of the Restatement (Second) of Torts and his claim for breach of an implied agreement of confidentiality. With respect to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion), the plaintiff was directed to explain the significance of plaintiff's exhibit "B" and submit any other evidence to support his claim that defendant Calhoon ordered the AIDS test.

The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B", has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not

order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically requested by Baptist Medical Center's blood bank due to the results of the HTLV-III test.

Accordingly, Dr. Scott Calhoon's motion for summary judgment on the plaintiff's § 652B claim is granted.

IT IS SO ORDERED this 12th day of December, 1989.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013

ROBERT WAYNE LEE,
Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,
Defendant-Appellee,

SCOTT W. CALHOUN, M.D., INC.,
Defendant.

[Filed November 6, 1991]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civ. 88-354-T)

Dianna S. Wisdom, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

George W. Paull, Jr., (George F. Short and Cynthia L. Sparling, Oklahoma City, Oklahoma; of counsel, Short, Barnes, Wiggins, Margo & Adler, with him on the brief) for Defendant-Appellee Scott Calhoon, M.D.

Before MOORE AND EBEL, Circuit Judges, and BROWN,* Senior District Judge

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BROWN, Senior District Judge.

---

* Honorable Wesley E. Brown, United States Senior District Judge, District of Kansas, sitting by designation

Plaintiff Robert Wayne Lee filed suit for medical malpractice. The claim arose from emergency surgery performed upon plaintiff to repair a perforated bowel. When the suit was filed, a reporter approached the defendant Dr. Calhoon.[1] The doctor explained that plaintiff's medical condition, requiring emergency surgery, was a consequence of patients who are AIDS carriers. This explanation appeared in a news item published in *The Daily Oklahoman.*

The facts are not in dispute. Plaintiff went to the emergency room of Baptist Hospital on May 3, 1987. He was examined by Dr. Crook and Dr. Camp, who diagnosed "possible acute appendicitis," and defendant Dr. Calhoon was called in for an evaluation. (Record Vol. II, Item 152.) Dr. Crook and Dr. Camp are not defendants in this action. Plaintiff signed a consent form for an appendectomy. Dr. Calhoon operated on the plaintiff. The surgery revealed that he suffered from a perforated bowel rather than appendicitis. Dr. Calhoon therefore performed a colostomy. A blood test subsequently revealed that plaintiff had tested positive for AIDS (the "HIV" virus).

Plaintiff then filed suit claiming Calhoon had misdiagnosed his condition and failed to obtain his consent for the unnecessary surgical procedure which was performed. Plaintiff's complaint, filed March 1, 1988, sought $38 million damages. The interview with the reporter took place on March 2, the day after the lawsuit was filed. The news item which appeared in the Daily Oklahoman was as follows:

> Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.

---

[1] "Calhoon" is the correct spelling of the defendant's surname.

> "He was seen in the emergency room and thought to have appendicitis," Calhoon said.
>
> "This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.
>
> "Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.
>
> "If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered," Calhoon said.

After this story appeared in the paper, plaintiff amended his complaint to include defamation, invasion of privacy, and breach of doctor/patient confidentiality.

The malpractice claim was dismissed,[2] and summary judgments were entered in favor of defendant Calhoon upon findings that plaintiff had waived his physician-patient privilege, and that plaintiff had failed to establish his right to proceed on his claims of defamation, invasion of privacy, and "intrusion upon seclusion."

In this appeal plaintiff contends that the district court erred in finding that plaintiff had waived the physician/patient privilege, and had further erred in finding that Dr. Calhoon's statements were conditionally privileged and did not violate plaintiff's privacy under Restatement (Second) of Torts § 652B. Plaintiff

---

[2] Plaintiff moved to dismiss with prejudice all of the defendants in this action with regard to his medical malpractice claims and to dismiss without prejudice the defendants Baptist Medical Center of Oklahoma, Oklahoma Healthcare and Baptist Medical Plaza Associates with regard to his invasion of privacy and disclosure of private information claims, reserving these claims only as to Dr. Calhoon. Record, Vol I, Item 86.

further contends that the trial court unduly limited discovery, and that disputed factual issues, and lack of consent for administering the AIDS test precluded dismissal of his claims by summary judgment.

Following our review of the record, we find no error and affirm the judgment.

The trial court entered a number of orders on cross motions for summary judgment before reaching a final judgment in this case, and it is necessary to discuss these in some detail.

By an order of March 3, 1989, the court dismissed plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center, Oklahoma Health Care & Baptist Medical Plaza Associated (Record Vol. I, Docket No. 119); and by order of March 16, (Docket No. 124), the court found that plaintiff failed to state a claim against these defendants, and their motion to dismiss was granted.

Additional orders were entered on March 16, (Record Vol. II, Docket Nos. 122, 123, 124). The court found that Dr. Calhoon was entitled to summary judgment on the plaintiff's defamation claim because his statement regarding plaintiff's status as an AIDS carrier was true. The court denied both parties' motions for summary judgment on other claims. The parties were directed to supplement the record with reference to plaintiff's claims for invasion of privacy as set out under Restatement (Second) of Torts § 652A. Thus, one who invades the privacy of another is liable for resulting harm when there is an "unreasonable intrusion upon the seclusion of another" (§ 652B), or "appropriation of the other's name or likeness" (§ 652C), or "publicity that unreasonably places the other in a false light before the public" (§ 652E).

Plaintiff's claim of "intrusion upon seclusion" is based on provisions of § 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Section 652B liability does not require publication of private matters. The invasion may consist of forced entry into a person's home, eavesdropping or spying upon a person's private affairs, or tampering with a person's private papers or mail.

Plaintiff's "invasion of privacy" claim is based upon § 652D which provides in pertinent part that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Liability under this section is based upon publicity given to true statements of fact. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." Comment b, § 652D.

In *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okl. 1980), the Oklahoma court recognized a right of action for invasion of privacy, if a plaintiff

could establish the public disclosure of a private fact, when such fact was not of "legitimate public concern."[3]

The district court correctly found that plaintiff became a public figure by filing his lawsuit, since the size of his claim — $38 million — and the nature of the claim — malpractice, had attracted the attention of the news media. As the court noted, these matters are of legitimate public concern "because of the public interest or debate regarding the size of litigation claims and jury awards . . . and the public concern in policing failures in the medical profession." In *Gilbert v. Medical Economics Company,* 665 F. 2d 305 (10th Cir. 1981), the defendant published an article discussing the personal and professional problems of a physician involved in two incidents of alleged malpractice. This court affirmed the grant of summary judgment to the publisher, recognizing that the article was of legitimate public interest, since it involved the competency of licensed professionals. We there noted that the publication of plaintiff's psychiatric and marital problems were "substantially relevant to the newsworthy topic," through "the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice." *Gilbert v. Medical Economics Co. supra,* 665 F. 2d at 308-309.

With respect to the question of whether the doctor's comments pertained to his defense of the law-

---

[3] In *McCormack* a news story related that plaintiff, "a one-time gambler and illegal casino operator in Oklahoma City," had connections with the Mafia and organized crime. Plaintiff claimed that the events mentioned occurred more than twenty years before, and that the publication invaded his right of privacy. While recognizing the tort of invasion of privacy, the court found that plaintiff made no allegation that the facts were private and not of public record, and did not allege that the facts were not of legitimate public concern. Dismissal of the case was affirmed upon the finding that there could be no liability for publicizing facts which were matters of public record.

suit, the court ordered Dr. Calhoon to provide evidence of this fact within five days of the order. On June 30, Dr. Calhoon supplied an affidavit establishing this connection (Record Vol II, Item 132):

> I affirmatively state that the statement made by me in response to questions by the newspaper reporter, and as printed in the newspaper article at issue in this case, were simply expressions of the facts and issues relevant to my defense in this multi-million dollar lawsuit about which I was being questioned. Mr. Lee's original lawsuit alleged that I did not advise him prior to the surgery that he might have a perforated bowel and require a colostomy. In my defense, had Mr. Lee advised me or had I known prior to surgery that Mr. Lee was an AIDS virus carrier, I would have been alerted to a higher probability that he might have a perforated bowel due to more esoteric types of infections which are common with immuno-compromised patients such as Mr. Lee, and I would have so informed him.

In this case, Dr. Calhoon's comments clearly pertained to his defense of the lawsuit, and, as found by the trial court, "were sufficiently related to the news story to preclude them from serving as the basis for an invasion of privacy claim."

The district court also found that defendant Calhoon was entitled to summary judgment on plaintiff's § 652 invasion of privacy claim because even if the plaintiff had not become an involuntary public figure, with a lawsuit which was a matter of public interest, Dr. Calhoon's statements were conditionally privileged under § 594. The elements of conditional privilege as set out in § 593 provide that one who publishes defamatory material is not liable if "the matter is published upon an occasion that makes it conditionally privileged, and the privilege is not

abused." The trial court correctly found that the defendant did not abuse the conditional privilege. Section 594 of the Restatement provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in § 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another . . . (Comment k, § 594)

The occasion upon which Dr. Calhoon made his statement and explanation, in response to the reporter's inquiry into the circumstances of the lawsuit, was clearly an instance in which Dr. Calhoon was entitled to provide information that affected his important interest in his own reputation as a medical provider. Plaintiff failed to provide any evidence that defendant abused his conditional privilege, and under such circumstance, the trial court properly entered summary judgment in favor of defendant upon the § 652 invasion of privacy claim.

As to plaintiff's claim for breach of an "implied agreement of confidentiality," the district court found that plaintiff had waived the physician-patient privilege under 76 Okl. Stat. § 19, which provides in pertinent part that:

> In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, . . . *he shall be deemed to waive any privilege* granted by law concerning *any* communication made to a physician or health care provider . . . or *any* knowledge obtained by such physician or health care provider by personal examination of any such patient; provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein according to existing rules of evidence. (Emphasis supplied.)

It is clear that Dr. Calhoon's comments were entirely relevant to the medical malpractice action in question, and the information he gave was the subject matter of his defense to plaintiff's allegation of malpractice. Indeed, his explanation of the cause and need for emergency surgery entirely justified the dismissal of all malpractice claims. Here the Oklahoma statute is very plain, and all inclusive — it covered "any privilege," and "any communication," with reference to "any physical or mental condition." Under Oklahoma law the language of the statute must prevail. In *Cave Springs Public School District I. 30.* 613 P. 2d 1046 (Okl. 1980), the rule was stated in this manner:

> Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules of construction, the statute will be accorded the meaning as expressed by the language therein employed.

Further support for the finding of a waiver of the physician-patient privilege is found in the trial court's reference to 12 O.S. § 1443.1, which provides that expressions of opinion in regard to judicial proceedings are not actionable as libel:

> 1443.1. Privileged communication defined — Exemption from libel
>
> A. A privileged publication or communication is one made:
>
> First. In any legislative or judicial proceeding or any other proceeding authorized by law;
>
> Second. In the proper discharge of an official duty;
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> B. No publication which under this section would be privileged shall be punishable as libel.

The trial court properly ruled that plaintiff waived the physician-patient privilege, and the entry of summary judgment in favor of defendant upon the claim of breach of the implied warranty of confidentiality was appropriate.

With respect to plaintiff's "invasion of privacy" claim, (§ 652B, *supra,* intrusion upon seclusion) which was based upon the allegation that blood had been drawn for the AIDS test without his permission, the court permitted the parties to submit additional information concerning the matter.

On July 24, 1989, the court allowed plaintiff time to conduct additional discovery "limited to the ques-

tion of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such," (Record Vol. II, Item 135).

On October 11, 1989, the court entered an order and final judgment granting defendant Calhoon summary judgment on plaintiff's remaining claim for invasion of privacy under § 652B because plaintiff failed to provide evidence to support such claim. Record Vol. II, Items 144, 145. On plaintiff's motion, the order and judgment were vacated and plaintiff was granted additional time until December 4 to conduct any further discovery necessary to establish his invasion of privacy claim. Record Vol. II, Item 149, Order of November 1, 1989. After reviewing all of the evidence presented by the parties on the issue, the court determined that plaintiff had failed to submit sufficient proof to controvert the evidence submitted by Dr. Calhoon which was to the effect that he did not order or authorize AIDS tests on the occasion in question. In accordance with these findings, judgment was again entered in favor of defendant, Dr. Calhoon. (Order and Judgment of December 12, 1989, Record Vol. II, Items 156, 157.)

In sworn statements, Dr. Calhoon denied that he ordered tests to determine plaintiff's AIDS status. (Vol. II, Item 128, Exhibits "A," "B"). Dr. Calhoon first learned that plaintiff was HIV positive on May 5, two days following the operation.

Plaintiff's argument that the tests were ordered by Dr. Calhoon is pure speculation and contrary to the evidence presented to the trial court. In lab reports submitted by plaintiff himself, several other doctors are noted as requesting tests — i.e., Doctors Gilcher, Crook, Camp, and "Non-Staff M.D." (Record Vol. II, Exhibits to Item 133.)

On the basis of affidavits and depositions presented on the issue the trial court made these findings:

> The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B," has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically required by the Baptist Medical Center's blood bank due to the results of the HTLV-III test.[4]

Plaintiff failed to submit any evidence to controvert defendant's evidence that Dr. Calhoon was not the one who ordered the AIDS test. The trial court properly dismissed the § 652B complaint because there was no genuine issue of conflicting material facts on the issue.

The rulings and judgment of the trial court were correct in all respects, and the Judgment is AFFIRMED.

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[4] See Depositions, Record Vol II, Exh. A to Docket 153 and Docket 154, Deposition of Carolyn Taylor, Baptist Medical Center Blood Bank.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013

ROBERT WAYNE LEE,
Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,
Defendant-Appellee,

and

SCOTT W. CALHOUN, M.D., INC.,
Defendant.

ORDER
[Filed January 16, 1992]

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, BROWN, Senior District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

SILVAN N. GOLDMAN CENTER
OKLAHOMA BLOOD INSTITUTE

Ronald O. Gilcher, MD, F.A.C.P.
Director

1001 N. Lincoln Blvd.
Okla. City, OK. 73104
(405) 232-0670

LEE, ROBERT W
1130871-5-01 SEX M AGE 38 YEAR(S)
CALHOON, SCOTT W MD RM. 4SE
OBI NUMBER: DATE ORDERED 5/21/1987

PATIENT INFORMATION:
NAME: BMCO 441 SS# or ID#_____

DIAGNOSIS:_____ AGE:_____ SEX:_____

SEND REPORT TO:_____ PHONE REPORT 949 6835
NAME AND TITLE TELEPHONE #

HOSPITAL or CLINIC: Baptist

	CITY	STATE	ZIP
ADDRESS: 3300 NW Expy	OKC	OK	73112

PLEASE CHECK TEST REQUESTED:

___ HEPATITIS PROFILE (include HBsAg, Anti-HBc, Anti-HBs, Anti-HAV, Ant-CHV, ALT)

	RESULT		RESULT
__ HBsAg	_____	__ Anti-HAV	_____
__ Anti-HBc	_____	__ Anti-HAV IgM	_____
__ Anti-HBc IgM	_____	__ Anti-CMV	_____
__ Anti-HBs	_____	__ ALT	_____IU/L
__ Anti-HBeAg	_____	X Anti-HTLV-III	positive R = 18
__ Anti-HBe	_____	__ RPR	_____
		X Western Blot	positive p55, p4, p24, p32, p18

INTERPRETATION AND COMMENTS:

The consensus at the July 31, 1985 CDC-sponsored meeting on Anti-HIV (HTLV-III) testing at the NIH on the interpretation of Anti-HIV (HTLV-III) tests results is as follows:

If the ratio of the optical density reading of the patient's sample to the cut-off value is:

≤ 2.0: Probably false positive
Repeat testing recommended in 2-3 months.

> 2.0 ≤ 7.0: Results are not conclusive
Repeat testing recommended in 2-3 months.

> 7.0: Consider true positive
(Western Blot testing is recommended for all positives).

(OBI USE ONLY) DATE AND TIME SAMPLE RECEIVED: 5/5/87 0100 TECH: 15
REPORTED BY PHONE:_____ TO:_____ TECH:___
DATE HAILED:_____ CATEGORY:_____

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.
3300 N.W. Expressway, Oklahoma City, Ok.

RESULTS

IgM Anti-HAV Negative

HBsAg Negative

Anti-HBc POSITIVE

Anti-HBs POSITIVE

INTERPRETATIVE COMMENTS

☑ No evidence of acute Hepatitis A.

☑ No evidence of acute Hepatitis B.

☐ Considered diagnostic of acute phase Hepatitis A.

☐ Considered diagnostic of acute phase Hepatitis B. (Consider carrier state or chronic hepatitis if HBsAg persistent beyond 6 months.)

☐ Consistent with early convalescent phase of Hepatitis B. (May represent post infection immunity if there has been no liver disease in past 6 months.)

☑ Consistent with recovery or immune phase of Hepatitis B.

☐ Patient is considered infectious.

☐ Patient may be infectious.

☑ Patient is not considered infectious.

☐ No serologic evidence of immunity to Hepatitis B.

☑ Serologic evidence of immunity to Hepatitis B is present.

☐ Comments:_____

_____

PATHOLOGIST B. Lanehart, MD
Pathologist

PATIENT Lee, Robert W. DOCTOR Calhoon, Scott ROOM 477

HOSPITAL NO. 5011130871 AGE 38 SEX M

ACCT # 4125 SPECIMEN DRAWN: DATE 5-5-87 TIME: 2035

LABORATORY: HEPATITIS PROFILE

OKLAHOMA TEACHING HOSPITALS LABORATORIES

T-CELL SUBSETS

477

PATIENT INFORMATION:
NAME: Lee, Robert W.
MRNO: 5011130871 BDATE: 38 y.o.
SEX : M LOCATION: Baptist Hospital Calhoon, S

SPECIMEN INFORMATION:
SPECIMEN: Whole Blood ACC#: 87FC4313
DATE COLLECTED: 5-5-87 RECEIVED: 5-6-87 PERFORMED: 5-6-87
PHYSICIAN: CALHOON

INSTRUMENT INFORMATION:
SPECTRUM III/ SYSTEM 50 : III TECH ID : NW
PMT Gains : F.W. Scatter 48 Rt Scatter 280
GRN. Fluro. 650

RESULTS:

White Blood Cell Differential : Total WBC 8600 counts/ul
Lymphocytes 25.6 % Monocytes 9.8 % Granulocytes 64.6 %

	Results % of Total Lymph.	Normal Range	Cell Count/ul	Mean Channel
Blank				48
(Pan T) OKT3	80.7	(64-78%)	1777	87
(Helper) OKT4	22.1	(35-48%)	487	70
(Suppress) OKT8	52.3	(21-34%)	1151	173
(E Rosette) OKT11	81.0	(73-85%)	1783	75
Ratio T4/T8	0.42	(1.19-2.23)		

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., ET AL.,
Defendants.

[Filed March 16, 1989]

ORDER

Plaintiff Robert Wayne Lee instituted this action against Baptist Medical Center of Oklahoma, Inc.; Dr. Scott Calhoun; Oklahoma Health Care Corporation and Baptist Medical Plaza Associates, Ltd. seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. Subsequent to the publication of a newspaper article in *The Daily Oklahoman*, which contained statements made by defendant Calhoun and related certain facts about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add allegations of defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Scott Calhoun, M.D. has filed a motion for partial summary judgment contending that the plaintiff was not defamed because the statements he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by Dr. Calhoun's statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that, because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of

confidentiality. For the following reasons, the court concludes that the defendant's motion should be granted in part, denied in part and deferred in part.

The plaintiff's claims, other than his cause of action for medical malpractice, are based on the divulgence by Dr. Calhoun of the fact that the plaintiff is a carrier of Acquired Immune Deficiency Syndrome virus,[1] and the publication of his statement. Defendant Calhoun seeks summary judgment on the plaintiff's defamation claim, on the ground that his statement regarding the plaintiff's status as an AIDS carrier is true. As proof, defendant Calhoun has attached to his motion a copy of the plaintiff's laboratory report. The plaintiff fails to respond to the defendant's evidence or to address his truth defense, which is a complete defense to a libel or slander action. 12 Okl. Stat. § 1444.1 See *Miskovsky v. Oklahoma Pub. Co.*, 654 P.2d 587 (Okl. 1982), cert. denied, 459 U.S. 923 (1982) (libel action); 12 Okl. Stat. § 1442 ("Slander is a false and unprivileged publication . . .) (emphasis added). Accordingly, defendant Calhoun is entitled to summary judgment on the plaintiff's defamation claim.

The plaintiff asserts that his privacy was invaded when unauthorized laboratory tests were conducted on his blood and when Dr. Calhoun publicly made statements regarding the plaintiff's status as a carrier of the AIDs virus. The Oklahoma courts have recognized the tort of invasion of privacy as set out in the Restatement (Second) of Torts, *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980)[2], and have held that one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of an-

[1] The plaintiff does not dispute the accuracy of this fact.

[2] In McCormack, the Oklahoma Supreme Court recognized the tort of invasion of privacy in the four categories enumerated in the Restatement (Second) of Torts. Only two are pertinent here, unreasonable intrusion and unreasonable publicity.

other or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okl. 1978). Restatement (Second) of Torts § 652B.

Defendant Calhoun argues that factors that are considered in determining the existence of an actionable intrusion are the means used to gain access to the alleged private information and the defendant's purpose for obtaining the information. Dr. Calhoun asserts that his knowledge of the plaintiff's carrier status "was the necessary result of the diagnostic procedures and the medical care and treatment of this patient, all of which were for legitimate medical purpose." Defendant Calhoun's Brief, p. 4. He also contends that to prevail on his claim for invasion of privacy based upon unreasonable intrusion, the plaintiff must establish an intentional interference in the solitude or seclusion of his physical being or a prying into his private affairs. Neither has been established here, defendant Calhoun asserts, because he did not order or request the laboratory studies that identified the plaintiff as a carrier of the AIDS virus.

In response, plaintiff contends that the test for exposure to the HTLV-III antigen was unauthorized and without his consent.[3] Consequently, a fact question appears to exist on the issue of whether defendant Calhoun made an intentional, unreasonable intrusion upon the plaintiff by performing an unnecessary and unauthorized test. Summary judg-

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[3] The court would note that *neither* party submitted any evidence on this issue.

ment on the plaintiff's claim for invasion of privacy premised on § 652B of the Restatement (Second) of Torts, intrusion upon seclusion, is, therefore, denied.[4]

The plaintiff also asserts that his privacy was invaded under § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[5]

Unquestionably, the statements plaintiff complains of were made public and generally would be offensive to a reasonable person. However, the court has not been convinced that the divulged facts were private, were not of public record, and were not of legitimate public concern. The parties' briefs do not adequately address these issues. The briefs also do not discuss the possibility that the defendant's statements may have been protected by a conditional

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[4] It is unclear whether plaintiff is actually asserting a claim for unreasonable intrusion or simply one for unreasonable publicity, as he states in his brief that his objection is the "subsequent misuse of such confidential information by the defendant Calhoun through its disclosure to the public via *The Daily Oklahoman* newspaper". Plaintiff's brief, p.8. Because of the plaintiff's statement that the blood test was performed without his consent, the court assumes plaintiff intends to pursue his § 652B claim. The court will reconsider its denial of summary judgment on this claim if it determines that the statements were privileged.

[5] To state a cause of action for invasion of privacy by publicity being given to a party's private life, it is not necessary that the statements be false. *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980).

privilege. See Restatement (Second) of Torts § § 652G, 594. The plaintiff and defendant Calhoun are directed to supplement their briefs on these points within twenty (20) days.[6]

The remaining claim of the plaintiff on which defendant Calhoun seeks summary judgment, is his cause of action for breach of an "implied agreement of confidentiality". Defendant Calhoun contends that he did not breach the confidential physician-patient relationship because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. The defendant relies exclusively on the statutory language in support of his argument and fails to cite any other authority. While the court does not concur with the plaintiff's very limited interpretation of 76 Okl. Stat § 19B, that any waiver by the plaintiff is limited to statements made in a hearing or a court sanctioned proceeding, it concludes that neither party has adequately addressed this issue. They both are directed to supplement their briefs within twenty days on the question of to what extent did the plaintiff, by the commencement of this action, waive the doctor-patient privilege.

IT IS SO ORDERED this 16th day of February, 1989.

UNITED STATES DISTRICT JUDGE

[6] Plaintiff asserts that the issues of public interest are limited to the allegations he has made in his complaint. This position ignores the fact that the plaintiff's status as a carrier of the AIDS virus may have been a partial defense to the plaintiff's malpractice claim, which has been dismissed.